IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-96

Filed: 3 November 2020

New Hanover County, Nos. 17CRS054688, 19CRS1347

STATE OF NORTH CAROLINA

v.

RONALD JEROME CROMARTIE, Defendant.

Appeal by Defendant from judgment entered 26 August 2019 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Meghan Adelle Jones for the defendant.

BROOK, Judge.

Ronald Jerome Cromartie ("Defendant") appeals from judgment entered upon jury verdicts on 26 August 2019 by Judge Richard Kent Harrell in New Hanover County Superior Court. Defendant argues that the trial court erred in denying his motion to quash the jury venire and that the trial court erred in permitting the State's expert witness to testify regarding the cause of the victim's death. We conclude,

respectively, that the trial court did not err and Defendant failed to preserve any objection.

I. Background

A. Factual Background

On the evening of 9 May 2017, Defendant, along with Arthur Williams, known as "Peanut," and others were gathered at 708 South 10th Street, Wilmington to drink and play cards. Defendant and Mr. Williams were discussing a matter involving Austin Clarkson, Jr., known as "Little." Later that evening, Defendant and Mr. Williams confronted Mr. Clarkson at 1206 Spofford Circle, Wilmington. Their initial altercation on the front porch was interrupted by a resident of the house. Defendant then nudged Mr. Clarkson through the house to the backyard. Defendant, Mr. Williams, and Mr. Clarkson were arguing loudly as they entered the backyard. Mr. Williams threatened Mr. Clarkson with a cattle prod. Defendant and Mr. Williams backed Mr. Clarkson up against a tree and began to hit him. After Defendant and Mr. Williams hit Mr. Clarkson several times, Defendant "put him in a headlock, and . . . slam[med] his head on the ground" while "flip[ping his] whole body backwards as [Mr. Clarkson's] neck [wa]s in [his] arm." Defendant then picked Mr. Clarkson up by his belt buckle and dropped him on his back several times. Mr. Clarkson's body was limp as it hit the ground.

Defendant picked Mr. Clarkson up, moved him into the backseat of Mr. Clarkson's pickup truck, and drove off. At approximately 3:00 a.m. on 10 May 2017, paramedics were dispatched to 708 South 10th Street, Wilmington. Paramedics found Mr. Clarkson on the front porch, who told them that "he had been out drinking, that someone had 'pile drived' him into the ground causing him to land on his head and his neck." The paramedics found Mr. Clarkson to be paralyzed from the neck down. He was transported to New Hanover Regional Medical Center.

Mr. Clarkson required surgery to stabilize the injury to his neck. His spinal injury impacted his breathing and required medical ventilation for the duration of his time in the hospital. During his treatment, a bronchoscopy confirmed a diagnosis of severe pneumonia which lead to adult respiratory distress syndrome ("ARDS"), "an inflammatory problem with the lungs that prevents adequate oxygenation with the lungs, even despite mechanical ventilation." Mr. Clarkson's condition continued to decline, and he died in the hospital on 3 June 2017.

B. Procedural History

Defendant was indicted by a New Hanover County grand jury on 26 June 2017 for first-degree murder. On 25 March 2019, he was indicted for first-degree kidnapping. Defendant was tried at the 19 August 2019 criminal session of New Hanover County Superior Court, Judge Harrell presiding. On 20 August 2019, Defendant filed a motion to quash the jury venire, asserting that of the 40 jurors in

the venire, only two—or 5%—were Black. Defendant argued that the Black population in New Hanover County was 14.8% of the total population, and that therefore there was a 9.8% disparity between the population of the community and Defendant's venire. Defendant argued that "the underrepresentation of African-Americans or Blacks is due to a systematic exclusion." Defendant requested that the trial court quash the jury venire and select a new jury venire from the community. The trial court denied Defendant's motion under N.C. Gen. Stat. § 15A-1211(c)(4) because the motion had not been made and decided prior to the examination of any juror.

At trial, the State called Dr. William Powers, a physician at New Hanover Regional Medical Center who treated Mr. Clarkson, as an expert in the practice of medicine, including surgery. Defendant objected as to the reliability prong under Rule 702 of the North Carolina Rules of Evidence. Upon request, the trial court allowed Defendant a voir dire examination of Dr. Powers. After voir dire, the trial court accepted Dr. Powers as an expert in medicine and trauma surgery. Dr. Powers testified that Mr. Clarkson's spinal cord injury caused pneumonia, which progressed into ARDS and caused his death. Defendant did not object to this testimony as it was offered.

The jury returned verdicts of guilty of first-degree murder under the felony murder rule and first-degree kidnapping. The trial court entered judgment upon

conviction for first-degree murder and imposed life imprisonment without parole on 26 August 2019. The trial court arrested judgment for first-degree kidnapping.

Defendant gave notice of appeal in open court.

II. Analysis

Defendant raises two issues on appeal. First, Defendant argues that the trial court erred in denying Defendant's challenge to the racial composition of the jury venire, which he argues underrepresented Black people given the community's racial composition. Defendant argues that the trial court failed to exercise its discretion based on a "misunderstanding of the facts" and that such error was prejudicial. Second, Defendant argues that the trial court erred by failing to conduct a reliability inquiry pursuant to Rule 702 of the North Carolina Rules of Evidence. We discuss each claim in turn.

A. Challenge to Jury Venire

Defendant contends that he timely raised a challenge to the racial composition of the jury venire and that the trial court erred in denying his motion for lack of timeliness. We disagree and conclude that Defendant raised but did not secure a ruling on his motion in the time required by N.C. Gen. Stat. § 15A-1211(c), and therefore the trial court did not err in denying Defendant's motion for being untimely.

i. Standard of Review

Challenges to the jury panel fall within the trial court's discretion. *State v. Wright*, 52 N.C. App. 166, 170, 278 S.E.2d 579, 584 (1981). Defendant alleges that the trial court failed to exercise its discretion because it denied Defendant's motion as untimely instead of considering the merits of Defendant's challenge.

> When a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable. In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.

State v. Lang, 301 N.C. 508, 510, 272 S.E.2d 123, 124–25 (1980) (internal citations omitted).

ii. Merits

Challenges to the jury venire in criminal cases are governed by N.C. Gen. Stat. § 15A-1211(c), which states:

> (c) The State or the defendant may challenge the jury panel. A challenge to the panel:
>
> (1) May be made only on the ground that the jurors were not selected or drawn according to law.
>
> (2) Must be in writing.
>
> (3) Must specify the facts constituting the ground of challenge.
>
> (4) Must be made and decided before any juror is examined.

N.C. Gen. Stat. § 15A-1211(c) (2019). The party bringing a challenge under § 15A-1211(c) bears the burden of following its procedural requirements. *See State v. Stroud*, 147 N.C. App. 549, 563-64, 557 S.E.2d 544, 553 (2001) (citing *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000)).

On 20 August 2019, Defendant filed a motion to quash the jury venire selected for the 19 August 2019 Superior Court trial session pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 24 and 26 of the North Carolina Constitution, and N.C. Gen. Stat. § 15A-1211. Prior to the questioning of any venirepersons, defense counsel and the trial court had the following exchange:

> [DEFENSE COUNSEL]: This morning we had filed a motion to quash the jury venire, and that was based on a racial disproportion in the community. We've now got three additional members of that racial group in the jury pool, which would put it a little less than proportionate of the case law would uphold it.
>
> THE COURT: Okay. Thank you, [defense counsel]. Anything else before we bring the jurors in?
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> [DEFENSE COUNSEL]: I think – for the record, I respect the court's decision, but I think I need to renew at every opportunity the denial of the motion to sever, so renewing that motion.
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> THE COURT: I understand, [defense counsel]. You've got to do what you can to protect your record.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: Let's bring the jurors in then.

The parties then began voir dire. During a recess from jury questioning, the following exchange occurred:

> THE COURT: [Defense counsel], do you have anything on behalf of the defense before the jurors come back?
>
> [DEFENSE COUNSEL]: Judge, I mentioned that motion to quash the jury venire this morning. During the break, I found out some other information about the venire in total, so I would like to approach and address that motion briefly.
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> THE COURT: All right.
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> [DEFENSE COUNSEL]: That's the case I'm referring to. So pursuant to the Sixth Amendment, you have a right to a jury of your peers. When we're looking at racial disparities in the jury venire, the Court has a three-prong test to kind of determine whether or not there's something going on that the venire needs to [be] dismissed and a new one brought in.
>
> So the first one is that there's a distinct group that's being not included. So in this case, there's 52 jurors. Out of those, there's five African Americans in the venire. So it's a distinct group. It's not a multi-race group, so it is a distinct group. The second prong is a disproportionate amount or a lack of those distinct group members present in the venire, so the population of the African American community in New Hanover County is right at 14.8 percent, so our 5 jurors would represent 11 percent of the venire, but that does include the venire in total, including courtroom 403, and they have 3 out of, I believe, 40, based on my understanding. So there's 8 out of 92 or so jurors and, you know, it's our contention that that doesn't represent the community. It's not a jury of his peers, or Mr. Cromartie's peers.
>
> The third is – the your [sic] Court kind of referenced it a different way than it's labelled, but they say it's a systematic exclusion. If we show that it's a systematic

> exclusion, then the venire needs to be struck, and I would say it's a systematic exclusion. We have this courtroom; we have that courtroom. That's just this trial week, and then Judge Gorham, in State v. Nixon, 09 CRS 63097 out of this county agreed with the argument that I put forth here when Ms. Marian Thompson brought it up. In that case, she didn't have – I believe it was a limited number of African Americans on the jury venire as well, so based on those three prongs, we would argue that it's in violation of his Sixth Amendment right and ask you to dismiss the venire and bring in a new one.
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> THE COURT: The challenge to the jury pool is denied. Under 15A-1211(c) that challenge has to be made before any juror is examined, and the defense passed up the opportunity to argue that issue before we started the jury examination, and for that reason it's denied.

As the trial court noted, a challenge to the jury panel "[m]ust be made and decided before any juror is examined." N.C. Gen. Stat. § 15A-1211(c) (2019). Defendant challenged the jury pool by filing a written motion but failed to request that the court decide the motion before any juror was examined. Therefore, the trial court did not err in denying Defendant's motion because, as the trial court stated, Defendant "passed up the opportunity to argue that issue before we started the jury examination[.]"

Even assuming that the trial court did err in denying Defendant's motion for being untimely, Defendant cannot show that the error was prejudicial because he failed to make a prima facie showing of disproportionate representation or systematic exclusion. *See Lang*, 301 N.C. at 510, 272 S.E.2d at 125 ("Where the error is

prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.").

"Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers. This constitutional guarantee assures that members of a defendant's own race have not been systematically and arbitrarily excluded from the jury pool which is to decide his guilt or innocence." *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998) (internal marks and citations omitted), *cert. denied*, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999). "However, the Sixth Amendment does not guarantee a defendant the right to a jury composed of members of a certain race or gender." *State v. Williams*, 355 N.C. 501, 549, 565 S.E.2d 609, 637 (2002) (internal marks and citation omitted). A successful motion to quash a jury venire for disproportionate representation must establish a prima facie violation of the right to be tried by a jury of one's peers. *Id.* To make a prima facie showing of such a violation, the defendant must establish:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. (quoting *Duren v. Missouri,* 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 586-87 (1979)).

Here, Defendant alleged a 9.8% disparity between the percentage of the Black population in New Hanover County and the percentage of Black jurors on Defendant's venire. However, in *Williams* and *State v. Price*, 301 N.C. 437, 447-48, 272 S.E.2d 103, 110-11 (1980), our Supreme Court concluded that disparities of 12.13% and 14%, respectively, were "insufficient . . . to conclude that the representation of African-Americans in [the] venire was not fair and reasonable in relation to their population in the community." *Williams*, 355 N.C. at 549, 565 S.E.2d at 638. We therefore cannot conclude that a disparity of 9.8% is sufficient to show that the representation of Black jurors on Defendant's venire was unfair and unreasonable.

Defendant also did not make a prima facie showing of systematic exclusion of Black jurors. In support of a finding of systematic exclusion, Defendant alleged that "in the other criminal trial session set for this week in New Hanover County Superior Court, there are only two African-American or Black citizens on the venire. Such a showing indicates that the underrepresentation of African-Americans or Blacks in the Defendant's venire is not an isolated occurrence." However, "[t]he fact that a particular jury *or a series of juries* does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Equal Protection Clause." *Williams*, 355 N.C. at 549-50, 565 S.E.2d at 638 (emphasis added) (internal marks omitted) (quoting *State v. Avery*, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980)).

We therefore conclude that Defendant has failed to establish that he was prejudiced by any alleged failure by the trial court to review Defendant's motion to quash the jury venire on the merits.

B. Rule 702 Reliability

Defendant also contends that he timely raised a challenge to the admission of Dr. Powers's testimony as to cause of death and that the trial court erred in failing to consider the reliability prong of Rule 702 of the North Carolina Rules of Evidence. We disagree and conclude that Defendant did not preserve this issue for appellate review because he failed to object contemporaneously with the introduction of the evidence at issue as required by Rule 10 of the North Carolina Rules of Appellate Procedure.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[i]n order to preserve an issue for appellate review, a party much have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2020). In interpreting this rule, our Supreme Court has held that the "defendant must make an objection to such evidence *at the time it is actually introduced* at trial." *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001). Further, an objection "made only during a hearing out of the

jury's presence prior to the actual introduction of the testimony" is insufficient to preserve an issue for appellate review. *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010).

At trial, Defendant objected outside of the presence of the jury to the testimony of Dr. Powers on the basis of "reliability to call him under 702." As a result, the trial court allowed Defendant a voir dire examination of Dr. Powers and afterward accepted him as an expert in medicine and trauma surgery. Defendant then failed to renew his objection before the jury. Further, Defendant failed to object at the time that the State introduced the contested testimony as to the cause of death. Because Defendant failed to renew his objection in the presence of the jury and at the time the evidence was introduced at trial, he has failed to preserve the issue for appellate review. N.C. R. App. P. 10(a)(1) (2020); *see Ray*, 364 N.C. at 277, 697 S.E.2d at 322.

III. Conclusion

The trial court did not err in denying Defendant's motion to quash the jury venire because Defendant failed to obtain a ruling on the motion in the time required by N.C. Gen. Stat. § 15A-1211(c), and, regardless, Defendant has not established he was prejudiced by any alleged error. We further conclude that Defendant did not preserve a Rule 702 reliability objection regarding the victim's cause of death.

NO ERROR IN PART; DISMISSED IN PART.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).